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No. 86-1118

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STEVEN CINNANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding expert testimony on the reliability of eyewitness identification.

2. Whether the district court abused its discretion by excluding statements made by petitioner's co-conspirators during plea negotiations and at a prior trial.

3. Whether newly discovered evidence entitled petitioner to a new trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 799 F.2d 842.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1986. A petition for rehearing was denied on November 3, 1986 (Pet. App. 17). The petition for a writ of certiorari was filed on December 31, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and conspiracy to import, possess and distribute cocaine and marijuana, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of 12 and 10 years' imprisonment, to be followed by a lifetime special parole term. Petitioner also was fined $80,000. The court of appeals affirmed

(Pet. App. 1-16).

1. The evidence at trial established that petitioner's co-defendant, Jorge Serna, recruited Marco Castellon to assist in the importation into the United States of several tons of marijuana (Pet. App. 4). The marijuana arrived in Brooklyn on March 13, 1984, hidden in a shipment of furniture (id. at 3). While waiting for the shipment to clear Customs, Castellon and Serna met at a Miami restaurant with petitioner and Kenneth Chupurdy, who were to distribute the marijuana. The meeting, at which Castellon served as a translator, lasted approximately 30 to 35 minutes; petitioner -- who was introduced to Castellon as "Steven" -- discussed his plans to pay for and distribute the marijuana, as well as other drug transactions. Id. at 5-6.

Meanwhile, unbeknownst to the conspirators, Customs agents had discovered the marijuana. They made a controlled delivery of the shipment to its destination, a brokerage firm. On April 2, 1984, Castellon paid the firm for the cargo, and it was driven away by Chupurdy. Castellon and Chupurdy subsequently were arrested. Petitioner's name was found in an address book discovered in Chupurdy's motel room. Pet. App. 3-4.

After his arrest, Castellon agreed to cooperate with federal law enforcement agents. He provided a complete physical description of "Steven," whose last name he did not know. The agents concluded that "Steven" was most likely petitioner, who resided in the Boca Raton area. When shown a photographic array that contained petitioner's 1980 driver's license photo, Castellon tentatively identified petitioner as "Steven." The agents then obtained petitioner's 1984 diver's license photo, in which petitioner had lighter hair and a mustache, and placed it in an array. Castellon again identified petitioner's photo as that of "Steven." Pet. App. 4, 8.

2. At trial, petitioner sought to introduce the testimony

of Robert Buckhout, who proposed to testify as an expert on the unreliability of eyewitness identifications. After a voir dire at which Buckhout described his theories, the district court excluded the proffered evidence. The court concluded that Buckhout's testimony would not assist the jury in determining the accuracy of Castellon's identification of petitioner. Alternatively, the court found under Fed. R. Evid. 403 that the probative value of Buckhout's testimony was substantially outweighed by the danger of prejudice and jury confusion. Tr. 1108-1112.

The district court also excluded two other pieces of proffered defense evidence. Petitioner proposed to introduce Serna's statement, made to a federal law enforcement agent during the course of aborted plea negotiations, that petitioner was not involved in the transaction. Because Serna was a co-defendant with petitioner, however, the district court ruled the statement inadmissible under Fed. R. Crim. P. 11(e)(6), which provides that "any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty" may "not be admitted against the defendant who was a participant in the plea discussions." See Pet. App. 11. The district court also excluded the prior testimony of Chupurdy, offered at his own trial, that he had not attended the meeting in Miami. Because the prosecutor did not have a motive to challenge Chupurdy's statement at the earlier trial, the district court below found it inadmissible at petitioner's trial under Fed. R. Evid. 804(b)(1). While the court indicated that it would permit introduction of the evidence if the jury also was informed that Chupurdy had been convicted, petitioner's counsel rejected this offer. See Pet. App. 13-14.

3. The court of appeals affirmed all of these rulings. The court held that the district judge's exclusion of Buckhout's

testimony was "not clearly erroneous," explaining that "[a] trial judge is accorded broad discretion in admitting or excluding expert testimony under Fed. R. Evid. 702 and in excluding testimony under Fed. R. Evid. 403 because of the danger of jury confusion or unfair prejudice" (Pet. App. 14-15). Here, the court noted that Buckhout "was ignorant of the conditions under which Castellon identified [petitioner's] photograph" and that "many of [Buckhout's] conclusions coincided with common sense" (id. at 15). While the court explained that it was sensitive to "the dangers of testimony based purely on eyewitness identification," it concluded that "this expert's proferred testimony" would simply have "mudd[ied] the waters" (ibid.).

The court of appeals also affirmed the district judge's other evidentiary rulings. The court found it obvious that Serna's disavowal of petitioner's participation in the scheme was made during the course of plea bargaining (Pet. App. 11-12). And while Serna's statement was made to a Drug Enforcement Administration agent rather than directly to a government attorney, the court explained that Fed. R. Crim. P. 11(e)(6) "can be fairly read to require the participation of a Government attorney in the plea discussions, but not necessarily his physical presence when a particular statement is made to agents whom the attorney has authorized to engage in plea discussions" (Pet. App. 13 (emphasis in original)). Similarly, the court of appeals found the exclusion of Chupurdy's prior testimony to be proper, noting that the prosecutor in Chupurdy's case "wisely * * * chose to focu[s] his cross-examination on the details of Chupurdy's transportation of the [marijuana] * * * rather than to emphasize to the jury Chupurdy's denial of [the Miami] meeting. Thus, exclusion of Chupurdy's statements was not an abuse of the trial court's discretion since the prosecutor had no real motive to explore Chupurdy's earlier statements." Id. at 14.

Petitioner also sought a new trial, arguing that the government had violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose a telephone message from one "Benji" that was found in Chupurdy's motel room; petitioner argued that, had he been able to locate "Benji," he might have created doubt in the minds of the jurors about his own guilt. The court noted, however, that the government had been unable to discover "Benji's" identity prior to trial, and therefore "simply had no basis to believe that the slip had any relevance to this case" (Pet. App. 11). The court also concluded that, "in light of Castellon's certain identification of [petitioner]," petitioner had "failed to show 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different'" (ibid. (quoting United States v. Bagley, No. 84-48 (July 2, 1985), slip op. 14)).

ARGUMENT

Before this Court, petitioner repeats the arguments that were rejected by the court of appeals. None has merit, and none warrants further review.

1. Petitioner first challenges (Pet. 5-10) the exclusion of Buckhout's evidence, contending that expert testimony on the reliability of eyewitness identifications is routinely admitted in other circuits. This contention is incorrect. A trial judge has broad discretion over the admission of expert testimony. See, e.g., Hamling v. United States, 418 U.S. 87, 127 (1974). And while several courts of appeals have indicated that expert testimony relating to the reliability of eyewitness identifications may be admissible in appropriate cases, these courts have emphasized that the evidence is excludable under Fed. R. Evid. 403 if it is unreliable, or if its introduction would confuse the jury or would waste time; the courts uniformly have left the decision whether to permit the introduction of such

evidence to the discretion of the trial judge. _/ Thus, as one court has noted -- in a decision on which petitioner relies (Pet. 10) -- "there is no federal authority for the proposition that such testimony must be admitted." United States v. Moore, 786 F.2d 1308, 1312-1313 (5th Cir. 1986) (emphasis in original).

The decision below falls squarely within this line of authority. The court of appeals held only that the district judge did not abuse his discretion in excluding Buckhout's testimony (Pet. App. 14). After examining the voir dire, the court of appeals noted that Buckhout was unfamiliar with Castellon's actual identification of petitioner and that "his proposed testimony basically consisted of general pronouncements" (id. at 15). In these circumstances, the court concluded that

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_/ This was the holding of United States v. Downing, 753 F.2d 1224 (3d Cir. 1985), on which petitioner relies (Pet. 9-10). The court of appeals in that case concluded that the district judge had erred in ruling that such expert testimony may never be admitted, and remanded to give the judge an opportunity to determine whether the proffered testimony would be helpful. Id. at 1228-1232, 1243. On remand, the district court concluded that the testimony -- offered by the unbiquitous Dr. Buckhout -- should be excluded because it was unreliable and confusing, and bore only a "weak connection" to the facts of the case. 609 F. Supp. 784, 790-792 (E.D. Pa. 1985). That ruling was affirmed on appeal without opinion. 780 F.2d 1017 (3d Cir. 1985). See also United States v. Sebetich, 776 F.2d 412, 418-420 (3d Cir. 1985). Three other courts of appeals also have indicated that expert testimony of this sort may be admissible, while declining to reverse convictions following the exclusion of the testimony. United States v. Moore, 786 F.2d 1308, 1312-1313 (5th Cir. 1986) (district court acted within its discretion in excluding evidence); United States v. Smith, 736 F.2d 1103, 1106-1107 (6th Cir. 1984), cert. denied, No. 84-5215 (Oct. 1, 1984) (exclusion of testimony not prejudicial); United States v. Fosher, 590 F.2d 381 (1st Cir. 1979) (district court acted within its discretion in excluding evidence). Other courts have held the exclusion of such evidence to be within a district court's discretion, without definitively deciding whether the evidence would be admissible under other circumstances. United States v. Brewer, 783 F.2d 841 (9th Cir. 1986), cert. denied, No. 85-6752 (Oct. 6, 1986); United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984); United States v. Watson, 587 F.2d 365, 368-369 (7th Cir. 1978), cert. denied, 439 U.S. 1132 (1979). Two circuits have ruled the evidence excludable without addressing Fed. R. Evid. 702. United States v. Benitez, 741 F.2d 1312, 1315 (11th Cir. 1984), cert. denied, No. 84-6171 (June 3, 1985); United States v. Brown, 540 F.2d 1048, 1053-1054 (10th Cir. 1976), cert. denied, 429 U.S. 1100 (1977).

the particular proffered testimony would only "muddy the waters" (ibid.). This factual determination is correct on the record here and does not warrant further consideration. _/

2. a. Petitioner's other evidentiary contentions also are without merit. The exculpatory statement made by Serna -- which was offered to a DEA agent who, at the instructions of an Assistant United States Attorney, was attempting to determine the sincerity of Serna's interest in a plea (Pet. App. 11-12) -- plainly came in the course of plea negotiations. The statement was thus inadmissible as a "statement made in the course of plea discussions with an attorney for the government." Fed. R. Crim. P. 11(e)(6)(D). _/ While the statement was made to a DEA agent rather than to a government lawyer, the court of appeals correctly concluded that Rule 11(e)(6)(D) was implicated because the agent's discussion with Serna had been authorized by an Assistant United States Attorney as part of continuing plea negotiations (see Pet. App. 13).

The Advisory Committee Notes to the 1979 Amendment to Rule 11 confirm that the Rule was intended to distinguish between statements made to law enforcement agents during routine questioning of a suspect, the admissibility of which are to be

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_/ Petitioner is incorrct in contending (Pet. 6-7) that the decision below is inconsistent with Barefoot v. Estelle, 463 U.S. 880 (1983). The court of appeals did not hold, as petitioner asserts, that an expert may testify only on the basis of personal knowledge. It concluded, instead, that the general and conclusory nature of Buckhout's proposed testimony, in combination with his lack of familiarity with the facts of this case, made his testimony more confusing than probative.

_/ Generally, such statements are inadmissible only "against the defendant who made the plea or was a participant in the plea discussions." Fed. R. Crim. P. 11(e)(6). As the court of appeals explained, however, if the statement had been introduced here "there is a strong likelihood that the jury would have considered it as evidence against Serna"; the court added that "[a] limiting instruction would have been ineffective to protect Serna from the devastating impact of the statement that was tantamount to a confession" (Pet. App. 12). Petitioner does not challenge this conclusion or argue that he should have been awarded a severance.

"resolved by that body of law dealing with police interrogations," and statements (such as the one here) made during sanctioned plea negotiations, which are "covered by the per se rule of 11(e)(6)." The other courts that have considered the issue agree that Rule 11(e)(6)(D) bars the admission of statements made to law enforcement agents during the course of authorized plea discussions. See United States v. Grant, 622 F.2d 308, 313 (8th Cir. 1980); see also United States v. Herman, 544 F.2d 791 (5th Cir. 1977) (pre-1979 version of Rule 11). _/ Review of this narrow issue accordingly is not warranted.

b. The exclusion of Chupurdy's prior testimony was, similarly, a proper exercize of the district court's discretion. Under Fed. R. Evid. 804(b)(1), a defendant may introduce former testimony only if the government "had a similar motive to develop the testimony by direct, cross, or redirect examination." Both courts below resolved this factual question by concluding that the prosecutor "had no real motive to explore Chupurdy's earlier statements" (Pet. App. 14). That conclusion was correct and does not warrant this Court's attention. As the court of appeals explained, Chupurdy acknowledged at his trial that he had transported the marijuana; his defense was that he mistakenly believed his cargo to be furniture. In cross-examining Chupurdy, the government's goal thus was not to identify the other participants in the conspiracy. It was,

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_/ Petitioner is incorrect in contending that this approach is inconsistent with Rachlin v. United States, 723 F.2d 1373 (8th Cir. 1983). In Rachlin, the court of appeals reiterated that statements made to agents in the course of plea negotiations are inadmissible "'where the law enforcement official is acting with express authority from a government attorney'" (id. at 1379 (quoting Grant, 622 F.2d at 313)). Rule 11(e)(6)(D) was not implicated in Rachlin because there was "no evidence that any Assistant United States Attorney ever gave the agents any authority to bargain with [the defendant]," and "the Assistant United States Attorney was in no way involved in arranging the * * * meeting where the incriminating statements were given" (723 F.2d at 1377).

instead, "to show that [Chupurdy's] claim of ignorance of [the] contents [of his tractor] was unbelievable" (ibid.). In these circumstances, exclusion of Chupurdy's former testimony was proper.

3. Finally, petitioner repeats his allegation of a violation of Brady v. Maryland, 373 U.S. 83 (1963) (see Pet. 15-17). He contends that, had he been aware of Chupurdy's message from "Benji," he could have argued to the jury that "Benji" had been the participant with Castellon and Chupurdy in the Miami meeting. But the court below found as a factual matter that, while "Benji" (who has since been identified) bears a resemblance to petitioner, petitioner "failed to show 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different'" (Pet. App. 11 (quoting United States v. Bagley, No. 84-48 (July 2, 1095), slip op. 14)). Petitioner appears to recognize that this is the proper standard for determining entitlement to a new trial (see Pet. 16), and he offers no reason to doubt the validity of the court of appeals' factual conclusion. / Further review of this factual finding therefore is not warranted.

/ The court of appeals explained that "Benji" did not match Castellon's original description of "Steven": "Benji" is considerably shorter and has darker hair (Pet. App. 10-11). In addition, of course, petitioner's name in fact is Steven; "Benji's" name appears to be Benjamin Lee Weinstein.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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